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March 30, 2011

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265

Dear Ms. Dortch:

The Commission is considering a draft order that "requires a facilities-based provider of commercial mobile data services to offer roaming arrangements to other such providers on commercially reasonable terms and conditions."[1] The draft order asserts that this new mandate would not be a common carrier requirement.

Simply saying that the Commission is not imposing a common carriage mandate does not, of course, make it true. It is the law, not labeling, that determines what is common carriage. Despite the proposal's attempt to redefine (contrary to precedent) what constitutes common carriage, the plain fact is that the data roaming requirement would be the essence of common carriage – compelling providers to offer service and limiting their discretion to determine whom and on what terms to serve. The Communications Act bars the Commission from imposing such common carrier obligations on data roaming. By depriving a carrier of the ability to walk away – the essence of what is private carriage – the Commission is, in fact and law, forcing a common carriage obligation. The Commission cannot evade the statute simply by recasting and redefining what common carriage means.

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[1] *See* Letter to The Honorable Lee Terry, Vice Chairman, Subcommittee on Communications and Technology, Committee on Energy and Commerce, House of Representatives, from Chairman Julius Genachowski, March 17, 2011, at 2 ("FCC Letter"). The data roaming requirement would be "subject to various limitations designed to account for and protect the legitimate interests of the companies that would be providing roaming." *Id*.

Verizon Wireless discusses below why the draft order is quintessential common carrier regulation, notwithstanding attempts to label it otherwise. It next reiterates why two provisions of the Act forbid the Commission from subjecting data roaming to common carrier treatment. Finally, it addresses additional legal issues related to a data roaming mandate, including why binding arbitration would itself be unlawful.

I. The Proposed Data Roaming Mandate Is Common Carriage.

In the letter to Congressman Terry, the Commission summarized the draft data roaming order and argued that the new rule does not constitute common carriage:

> [T]he draft order under consideration eschews a common carrier approach and leaves mobile service providers free to negotiate and determine, on a customer-by-customer basis, the commercially reasonable terms of data roaming agreements. This is not common carriage. *See National Ass'n of Regulatory Util. Comm'rs v. FCC,* 525 F.2d 630, 641 (1976) ["*NARUC I*"] (stating that "to be a common carrier one must hold oneself indiscriminately to the clientele one is suited to serve" and "a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal").[2]

Verizon Wireless respectfully submits that the assertions in the FCC Letter are both wrong as a matter of law and inconsistent with prior Commission findings in this docket. Indeed, a review of relevant precedent – including the *NARUC I* decision cited in the letter – firmly establishes that the proposed data roaming rules would impermissibly impose common carrier regulatory obligations on providers of mobile data services.

A. Under *NARUC I* and Its Progeny, the Proposed Regulation Constitutes Common Carrier Regulation.

As a threshold matter, status as common carriage regulation depends on "the character of regulatory obligations," not the label the Commission gives them.[3] The assertion that the proposed regulation "is not common carriage" is therefore not dispositive; it is the nature of the obligations that governs.

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[2] *Id.* at 2.

[3] *FCC v. Midwest Video Corp*., 440 U.S. 689, 702 (1979); *see NARUC I*, 525 F.2d at 644 ("A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.").

It is well settled that "the primary *sine qua non* of common carrier status … arises out of the undertaking to carry for all people indifferently."[4] As the FCC Letter similarly notes, citing *NARUC I*, "to be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve."[5] In determining whether service is being offered indiscriminately, the *NARUC I* court looked first to whether there is "[any] indication in the proposed regulations that [providers] are to be *in any way compelled to serve* any particular applicant."[6]

In short, common carrier status is directly tied to whether the provider is compelled to serve all qualified users.[7] This is exactly what the proposed data roaming rules require. As the FCC Letter notes, providers will be "*require[d] ... to offer* roaming arrangements to other such providers on commercially reasonable terms and conditions."[8] Providers will thus essentially be obligated, for the first time, to strike data roaming arrangements with all qualified entities indiscriminately, *i.e.* the *sine qua non* of common carriage.

It should be noted that although the roaming requirement would be "subject to various limitations,"[9] it is "not an obstacle to common carrier status that [a provider] offer a service" that would be limited to certain "eligibles" under the rule; the key factor is that the operator "offer indiscriminate service to whatever public its service may legally and practically be of use."[10] Indeed, in this very proceeding, on two separate occasions the Commission found that automatic voice roaming was a common carrier service notwithstanding the fact that only a subset of requesting entities could trigger the obligation. In 2007, for example, the Commission stated, "[w]e are not requiring a CMRS carrier to provide automatic roaming to a requesting CMRS carrier in a market

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[4] *NARUC v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*") (internal quotation marks omitted); *see NARUC I*, 525 F.2d at 641-42; *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480-81 (D.C. Cir. 1994); *Salsgiver Telecom, Inc*., 22 FCC Rcd 9285, 9288 ¶ 8 (EB 2007).

[5] FCC Letter at 2 (quoting *NARUC I*, 525 F.2d at 641). Courts use the terms "indifferently" and "indiscriminately" interchangeably. *Compare NARUC I*, 525 F.2d at 641 ("[I]mplicit in the common carrier concept is that the carrier 'undertakes to carry for all people indifferently ….'") *with id*. ("[T]o be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve ….."); *see Iowa Telcoms. Servs. v. Iowa Utils. Bd*., 545 F. Supp. 2d 869, 876 (S.D. Iowa 2008) (recognizing that to be a common carrier, a carrier must "hold itself out indiscriminately or indifferently to the clientele it serves") (citing *NARUC I*, 525 F.2d at 641), *aff'd,* 563 F.3d 743 (8th Cir. 2009).

[6] *NARUC I*, 525 F.2d at 642 (emphasis added).

[7] *See Iowa Telcoms. Servs.*, 563 F.3d at 749 ("The key factor in finding common carriage is the *offering of 'indiscriminate service* to whatever public [the carrier's] service may legally and practically be of use.'") (emphasis added); *see also infra* notes 21-26 & accompanying text (discussing the *Iowa Telecommunications Services* and *Orloff* appellate precedent).

[8] FCC Letter at 2 (emphasis added).

[9] *See supra* note 1.

[10] *NARUC I*, 525 F.2d at 642.

where the CMRS carrier directly competes with the requesting CMRS carrier."[11] In the 2010 decision that eliminated this "home roaming" exception, the Commission nonetheless limited the common carrier obligation only to technologically compatible carriers making "reasonable requests" and then identified eleven non-exclusive factors relevant on a case-by-case basis "when considering whether requiring roaming in the circumstances at issue would best further our public interest goals."[12] Any action here mandating a data roaming obligation to a subset of providers similarly constitutes common carriage.

The FCC Letter appears to take the position that the requirement to hold oneself out indiscriminately refers not to a duty to carry but to the offering of non-discriminatory terms and conditions,[13] citing the finding in *NARUC I* that "a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal."[14] As the FCC has previously recognized, however, "[t]his statement … articulates the 'quasi-public character implicit in the common carrier concept' - *i.e*., that the carrier 'undertakes to carry for all people indifferently.'"[15] In other words, a provider is a non-common carrier providing service discriminately where it "refuse[s] to deal with any segment of the public whose business is of the 'type normally accepted,'" as would be the case where the provider "declined to serve any particular demographic group."[16] Here, exactly the opposite would be true: commercial mobile data service providers would not be permitted to "refuse" to provide data roaming but rather would be "compelled" to do so.

Indeed, when the *NARUC I* court applied the "whether and on what terms to deal" standard to Specialized Mobile Radio Systems ("SMRS") at issue in that case, it asked whether there was "[any] indication in the proposed regulations that SMRS … *discretion* in determining whom, and on what terms to serve, *is to be in any way limited*."[17] The court found no limits on SMRS discretion and agreed that SMRS was not a common

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[11] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15835 ¶ 48 (2007) ("*2007 Roaming Order*").

[12] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, Order on Reconsideration and Second Notice of Proposed Rulemaking*, 25 FCC Rcd 4181, 4200-01 ¶ 39 (2010) ("*2010 Roaming Order*").

[13] FCC Letter at 2 (asserting that because service providers will be "free to negotiate and determine, on a customer-by-customer basis, the commercially reasonable terms of data roaming agreements," the proposed data roaming mandate "is not common carriage").

[14] *Id.* (quoting *NARUC I*, 525 F.2d at 641).

[15] *Orloff v. Vodafone AirTouch Licenses LLC*, 17 FCC Rcd 8987, 8997 ¶ 21 (2002) (quoting *NARUC I*, 525 F.2d at 641), *aff'd sub. nom., Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) ("*Orloff*").

[16] *Id*.

[17] *NARUC I*, 525 F.2d at 642 (emphasis added).

carrier service. Here, providers will be required to offer data roaming and will no longer have the discretion to decide "whether" to deal with particular data roaming requests.[18]

Further, data roaming providers' current discretion to decide "on what terms to deal"[19] also will be circumscribed under the proposed regulation, which calls for terms of service to be governed by a "commercially reasonable" standard – defined not by the parties but by the Commission in the event of disputes. To the extent that the Commission imposes rates, terms and conditions as the result of a dispute, for example,[20] mobile data service providers' discretion "on what terms to deal" would be further limited – reinforcing that the new requirement must be viewed as common carriage. Additionally, under standard usage, "commercially reasonable" is a contractual term of art that depends on the circumstances of a particular case and includes the ability to walk away from negotiations for business or other legitimate reasons.[21] The proposed regulation curtails the ability to walk away from negotiations,[22] however, so the "commercially reasonable" moniker is a misnomer.

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[18] Today, "Verizon Wireless makes 'individualized decisions, in particular cases, whether and on what terms to deal' with potential roaming partners." Reply Comments of Verizon Wireless, WT Docket No. 05-265, at 32 (Jul. 12, 2010).

[19] As Verizon Wireless has previously explained: "[W]here data roaming is provided, it is provided on a discretionary basis, exclusively through individual negotiations between carriers." Comments of Verizon Wireless, WT Docket No. 05-265, at 31 (Jun. 14, 2010).

[20] Trade press indicates that some form of arbitration may be under consideration. *See* CableFax Daily, *Portal Preview: For Whom the Pole Tolls*, Mar. 18, 2011 (noting that at the next open meeting the Commission may take up a roaming order "designed to compel wireless carriers … to open their networks up for data roaming," and that proposals in the record have "urged the FCC to establish a 'shot clock,' or time limit, for negotiation of roaming agreements, backstopped by the possibility of Commission mediation or arbitration").

[21] *See, e.g., Centennial P.R. License Corp. v. Telecomms. Regulatory Bd. of P.R.*, No. 10-1091, 2011 U.S. App. LEXIS 2341 **46-47 (1st Cir. Feb. 7, 2011) (holding that "commercially reasonable efforts" do not require a wireless carrier to reach an interconnection arrangement with "all suitors" when there is a "business, technology or efficiency ground" justification for not reaching an agreement); *West Texas Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1563-64 (5th Cir. 1990) ("Whether a specific condition is [commercially] reasonable must be determined by examining the circumstances of a particular case.") (citation omitted); *Fleet Nat'l Bank v. H & D Entertainment*, 926 F. Supp. 226, 245 n.68 (D. Mass.) (noting that "a sale will be considered 'commercially reasonable' if it is made in the usual manner in a recognized market, or sold at a price current in such market at the time of sale") (citing U.C.C. § 9-507(a)), *aff'd*, 96 F.3d 532 (1st Cir. 1996); *Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, 18 FCC Rcd 25887, 25920-21(WCB 2003) (recognizing that a "[p]arty that makes commercially reasonable efforts to initiate negotiation of a direct and reciprocal traffic exchange agreement" may not be successful).

[22] *Cf. NARUC I*, 525 F.2d at 643 (noting that that there "may be a very sound basis for accepting or rejecting an applicant").

Moreover, courts have found that the ability of carriers to strike individualized deals does not remove the proposed regulation from common carriage. For example, in *Iowa Telecommunications Services, Inc. v. Iowa Utils. Bd*., the Eighth Circuit had to determine whether Sprint was a common carrier entitled to interconnect with various local exchange carriers' networks.[23] The LECs contended that Sprint was not a common carrier because it had partnered with a local cable company to provide end user telephone services pursuant to an individually negotiated contract.[24] The court disagreed, upholding the district court's finding that Sprint qualified as a telecommunications carrier, and thus a common carrier,[25] because it offered service indiscriminately to local cable companies – notwithstanding individually negotiated contracts.[26]

Similarly, in *Orloff v.FCC*, a carrier's status as a common carrier remained unchanged, notwithstanding its ability to enter into individualized negotiations with customers.[27] There, the D.C. Circuit held that a CMRS carrier's offering of individualized sales concessions to similarly-situated customers did not violate the non-discrimination clause of Section 202(a) of the Act.[28]

In sum, because the proposed regulation compels the provision of data roaming, limiting the discretion of providers to determine whom and on what terms to serve, it is common carriage. The fact that providers may "negotiate … the commercially reasonable terms of data roaming agreements" does not change the common carrier nature of the proposed regulation.

B. Classifying Data Roaming as Non-Common Carriage Is Also Inconsistent with Prior Commission Findings in this Docket.

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[23] *Iowa Telcoms. Servs.*, 563 F.3d at 745-46.

[24] *Id.* at 746-47 ("[Iowa Telecom] contends … that Sprint does not or will not serve … users indifferently or indiscriminately because its contracts are confidential and individually negotiated and its rates are not public.").

[25] *See id*. at 746 ("The Federal Communications Commission (FCC) has held that the term 'telecommunications carrier' has essentially the same meaning as the term 'common carrier' under the Communications Act of 1934.").

[26] *Id*. at 748, 750 ("Sprint seeks common carrier status by holding itself out to be a common carrier and representing that it will serve all potential users. Its individually negotiated, private contracts do not outweigh the evidence of common carriage …. There is no evidence in the record that Sprint discriminates or will discriminate in providing telecommunication services. Instead, Iowa Telecom has asked us to assume that Sprint does not offer its services indiscriminately because the terms and rates of Sprint's contract with MCC are individually negotiated and confidential. We recognize that Sprint's contracts with last-mile providers will vary depending on the services the last-mile provider chooses and that the terms and rates included in those contracts will be confidential. *Those facts alone, however, do not overcome the evidence that Sprint is acting as a common carrier* ….") (emphasis added).

[27] *See Orloff*, 352 F.3d at 418-20.

[28] *Id.* at 417, 421.

The Commission has previously concluded that the provision of roaming (voice roaming) is a common carrier service – even though it fully expects roaming providers to treat requesting parties on an individualized basis. As noted above, just last year the Commission reiterated that automatic voice roaming is a common carrier obligation for CMRS carriers and established that "home roaming will be subject to the automatic roaming requirement and, as a common carrier service, is subject to Sections 201 and 202 of the Act."[29] The Commission determined further that roaming disputes would be resolved "based on the totality of the circumstances of a particular case,"[30] and it identified eleven non-exclusive factors that could be taken into account in each case to determine whether a CMRS provider's response to a particular request for automatic roaming was reasonable under Title II of the Act.[31] The Commission was thus aware that CMRS providers treated, and would continue to treat, automatic roaming requests on an individualized basis – yet concluded that such a framework falls within common carriage.

Indeed, the Commission has consistently determined in the voice roaming context that a requirement to provide automatic roaming is "a common carrier obligation."[32] Thus, contrary to the assertions in the letter to Congressman Terry, the Commission's own prior decisions compel the conclusion that the new data roaming rules would constitute common carrier regulation.

II. The Act Bars the Commission from Imposing Common Carrier Obligations on Data Roaming.

As Verizon Wireless has previously demonstrated, two provisions of the Act prohibit the FCC from extending an automatic roaming obligation – a quintessential common carrier regulation – to data services.[33]

First, because data roaming is not a commercial mobile service (or its functional equivalent), section 332(c)(2) of the Act forbids the Commission from subjecting it to common carrier regulation. Section 332(c)(2) directs that a person providing a private mobile service "shall not … be treated as a common carrier for any purpose" under the

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[29] *2010 Roaming Order*, 25 FCC Rcd at 4182 ¶ 2.

[30] *Id*. at 4200 ¶ 37.

[31] *Id*. at 4200-01 ¶¶ 39-40 (these factors include, *inter alia*, the extent/nature of the requesting carrier's buildout; whether the requesting carrier is seeking roaming where it is already providing facilitates-based service; the impact of granting the request on incentives to invest in facilities and coverage; and whether alternative roaming partners are available).

[32] *See 2007 Roaming Order*, 22 FCC Rcd at 15819 ¶ 2; *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report*, 25 FCC Rcd 11407, 11490 ¶ 126 (2010).

[33] *See generally Ex Parte* Letter from John T. Scott, III, Vice President & Deputy General Counsel, Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265 (Nov. 8, 2010) ("Verizon Wireless *Ex Parte*").

Act.[34] As has been demonstrated in the record in this proceeding, data roaming is plainly a private mobile service[35] – that is, it is a "mobile service" under the Act but is "not a commercial mobile service or the functional equivalent of a commercial mobile service."[36] Accordingly, as the Commission has concluded for wireless broadband Internet access service, data roaming service must be "free from common carrier regulation."[37]

Second, because data roaming is not a telecommunications service,[38] Section 153(51) of the Act bars the Commission from imposing common carrier obligations on such services. Section 153(51) establishes that a "telecommunications carrier shall be treated as a common carrier … only to the extent that it is engaged in providing telecommunications services,"[39] and thus bars the imposition of any common carrier obligations upon telecommunications carriers' provision of non-telecommunications services. On numerous occasions the Commission has found that broadband Internet access service is an information service, not a telecommunications service.[40] Accordingly, regulation of data roaming services on a common carrier basis is prohibited on this separate basis, as well.

The letter to Congressman Terry seeks to evade these statutory provisions by suddenly relabeling what has been always viewed as common carriage as no longer common carriage. The Commission cannot avoid these provisions and ignore its own precedent in pursuit of a new mandate.

III. A Data Roaming Mandate Presents Additional Legal Problems.

There are three additional reasons why a data roaming mandate presents legal concerns. First, as noted, trade press indicates that some form of arbitration may be under consideration.[41] To the extent the draft order contemplates a framework in which arbitration of roaming agreements is mandated, it would run afoul of the Administrative Dispute Resolution Act ("ADR Act").[42]

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[34] 47 U.S.C. § 332(c)(2).

[35] *See, e.g.,* Verizon Wireless *Ex Parte* at 3-9.

[36] 47 U.S.C. §§ 153(33), 332(d)(3).

[37] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling*, 22 FCC Rcd 5901, 5921 ¶ 54 (2007) ("*Wireless Broadband Classification Order*").

[38] *See, e.g*., Verizon Wireless *Ex Parte* at 10-13.

[39] 47 U.S.C. § 153(51) (formerly § 153(44) prior to adoption of the 21st Century Communications and Video Accessibility Act).

[40] *See, e.g., Wireless Broadband Classification Order*, 22 FCC Rcd at 5910-11 ¶¶ 25-26.

[41] *See supra* note 18.

[42] Pub. L. No. 104-320, 110 Stat. 3870 (1996) (codified at 5 U.S.C. §§ 571-84).

Under the ADR Act, agencies may entertain the use of alternative dispute resolution ("ADR") techniques only "if the parties agree to such proceeding,"[43] and arbitration in particular may be employed "whenever all parties consent."[44] The Commission cited these constraints when it declined to mandate arbitration in the program access context and instead chose to create enhanced opportunities for the use of ADR in such disputes.[45] Indeed, the Commission has recognized that "the consent of all parties is required before ADR methods will be used."[46] In the absence of legislation expressly permitting the use of mandatory arbitration,[47] the Commission is prohibited by the ADR Act from compelling the use of arbitration without all parties' consent.

More fundamentally, the Commission lacks statutory authority to compel arbitration of data roaming agreements. The various provisions that establish complaint mechanisms or enforcement mechanisms spell out when the Commission can hear complaints,[48] when parties go to district court,[49] and how the Commission can enforce its own rules and orders by imposing penalties or forfeitures or by going to district court.[50] None of these provisions, however, is relevant here or mentions compulsory arbitration as a method for addressing disputes.

Second, because application of the contemplated rule to existing licenses would alter the value of the rights acquired at auction through a winning bid – rights upon which licensees relied in determining their bids – such application would manifest "secondary

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[43] 5 U.S.C. § 572(a).

[44] 5 U.S.C. § 575(a)(1).

[45] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Notice of Proposed Rulemaking,* 22 FCC Rcd 17791, 17859 ¶¶ 112-13 & n.509 (2007).

[46] *Use of Alternative Dispute Resolution Procedures in Proceedings Before the Commission in Which the Commission is Not a Party, Notice of Proposed Rulemaking and Second Notice of Inquiry*, 7 FCC Rcd 2874, 2874 ¶ 2 (1992).

[47] While the Commission does employ mandatory "final offer" or "baseball" arbitration in the context of resolving Section 252 interconnection disputes when state commissions fail to act, *see* 47 C.F.R. § 51.807(b), (d); *WorldCom, Inc. and AT&T Communications of Va., Inc*., 18 FCC Rcd 17722, 17736-37 ¶¶ 24-25 (WCB 2003), the use of mandatory arbitration to resolve such disputes is required by Section 252 itself, *see* 47 U.S.C. § 252(b) ("Agreements Arrived at through Compulsory Arbitration"). The Commission did not choose to employ mandatory arbitration in such cases; Congress did. The Commission simply chose which particular style of arbitration to employ when it stands in for state commissions pursuant to Section 252(e)(5), 47 U.S.C. § 252(e)(5), after conducting a rulemaking to determine how to conduct such arbitration, among other things. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16127-32 ¶¶ 1283-95 (1996) (subsequent history omitted).

[48] 47 U.S.C. § 208.

[49] 47 U.S.C. § 207.

[50] 47 U.S.C. §§ 501-04.

retroactivity."[51] The Commission must therefore justify as reasonable both the rule and the decision to apply it to existing licenses.[52] Although "an agency must be allowed to adjust its policies to changing circumstances," it must do so "within the framework of rules it established in advance of the auction."[53] As the D.C. Circuit has observed, an "agency cannot, in fairness, radically change the terms of an auction after the fact."[54]

The imposition of a data roaming requirement is decidedly not "within the framework of rules" in place before the major wireless auctions. To the contrary, the Commission has consistently held that wireless broadband, as an information service, could not be subjected to such a common carrier requirement.[55] Auction bidders relied on this framework in forming their bids. Indeed, in the 700 MHz C Block context, for example, the Commission told bidders that it would "not impose additional requirements on the C Block, including wholesale and interconnection requirements."[56] Imposition of a data roaming obligation now would affect a sea-change in the regulatory framework, one that threatens substantial investments that mobile providers have made in spectrum licenses. For these reasons, the secondary retroactivity is unfair and unreasonable, and thus cannot be sustained.[57]

Third, to the extent the new rule would require carriers to offer data roaming to carriers in markets where the requesting carrier holds spectrum rights, the rule would violate the Commission's decision not to mandate resale. Roaming within a market where the requesting carrier holds spectrum rights is fundamentally different than roaming outside that carrier's licensed area of service and is far more akin to resale. The Commission adopted the automatic roaming rule in 2007 because wireless customers

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[51] *See Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (secondary retroactivity "occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation").

[52] *See Celtronix Telemetry v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001).

[53] *U.S. AirWaves, Inc. v. FCC,* 232 F.3d 227, 235-236 (D.C. Cir. 2000).

[54] *Id.* at 235.

[55] *See, e.g., Wireless Broadband Classification Order*, 22 FCC Rcd at 5901-02 ¶¶ 1-2, 5903 ¶ 5, 5915-21 ¶¶ 37-56.

[56] *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Second Report and Order*, 22 FCC Rcd 15289, 15365 ¶ 206 (2007).

[57] This situation is easily distinguishable from cases in which secondary retroactivity was deemed reasonable. In those cases, the changes at issue were minor, *see Celtronix Telemetry*, 272 F.3d at 589 (changes to grace period provisions for late license payments were "trivial and likely beneficial," and it was "utterly improbable that the old grace provisions could have induced reliance"); *U.S. AirWaves,* 232 F.3d at 235-36 (Commission eased payment obligations of winning bidders, but "was careful to temper its liberalization"), or the Commission was engaged in the heart of its spectrum management duties, *see Mobile Relay*, 457 F.3d at 11 ("The Rebanding Decision was reasonable because … the Commission sought to segregate incompatible mobile communications architectures to reduce interference with high-site public safety systems pursuant to its public interest mandate.").

"expect to roam automatically on other carriers' networks *when they are out of their home service area*."[58] In contrast, home roaming enables a licensee with spectrum rights in a given area to offer service using its competitor's spectrum and network rather than its own. Indeed, in a market where a requesting carrier holds spectrum rights but has yet to build out or initiate service, or where the carrier seeks access to technologies – such as LTE – that it has not yet implemented in its own network, the requesting carrier is seeking resale, not roaming.

The *2007 Roaming Order* draws the obvious linkage to resale,[59] and makes clear that "automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks."[60] It rightly concludes that such an arrangement "could harm facilities-based competition … adversely impacting network quality, reliability and coverage."[61] When the Commission ultimately adopted a home roaming obligation in the voice context, it rejected arguments that home roaming and resale were essentially indistinguishable, but provided no substantive explanation in support of its conclusory finding.[62]

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For the reasons discussed above and in Verizon Wireless's prior submissions in this docket, the Commission lacks a legal basis to impose an automatic data roaming rule. This letter is submitted pursuant to section 1.1206 of the Commission's rules. Should you have any questions, please contact the undersigned.

Sincerely,

John T. Scott, III

cc: Rick Kaplan
Angela Giancarlo
John Giusti
Charles Mathias
Louis Peraertz
Austin Schlick
Ruth Milkman
James Schlichting

[58] *2007 Roaming Order*, 22 FCC Rcd at 15828 ¶ 27 (emphasis added).

[59] The order's resale definition is in effect home roaming: "a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider." *Id.* at 15836 ¶ 51.

[60] *Id.* at 15836 ¶ 51.

[61] *Id.* at ¶ 49.

[62] *See 2010 Roaming Order*, 25 FCC Rcd at 4199 ¶ 35.